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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 393

PHOENIX ASSURANCE COMPANY OF NEW YORK,
PETITIONER

v.

CITY OF BUCKNER, MISSOURI, BYRON B. CRAIL and HOUSING AND HOME FINANCE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT HOUSING AND HOME FINANCE ADMINISTRATOR IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 181-193)[1] is unreported. The opinion of the Court of Appeals (Pet. App. A, pp. A1-A8) is as yet unreported.

[1] "R." references are to the printed record filed by petitioner in the Court of Appeals which has been filed by the petitioner in this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1962. The petition for a writ of certiorari was filed on August 31, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, there is any basis for the imposition of liability on the Housing and Home Finance Administrator.

STATEMENT

This action was brought by petitioner against the City of Buckner, Missouri, the Housing and Home Finance Administrator, and William A. Reser, seeking a declaratory judgment that a performance bond executed by petitioner was void. In the alternative, judgment was sought against the Housing and Home Finance Administrator for any loss sustained by petitioner in discharging its obligation on the bond.

On March 30, 1956, the City of Buckner entered into a contract with William A. Reser for the construction of a sewer system (R. 113). The contract provided that work on the project was to commence at a date specified by the City in a written notice to proceed, which was to be delivered to Reser. On April 19, 1956, petitioner issued a performance bond under which it became bound to the City of Buckner for any default by Reser (R. 111).

On March 16, 1956, the City of Buckner made

formal application to the Housing and Home Finance Agency (HHFA) requesting the agency to purchase $150,000 worth of General Revenue bonds that had been voted by the city council for the construction of the sewer system (R. 74). An offer to lend the City $150,000 for the project was made on July 18, 1956 (R. 84), expressly conditioned on the City's compliance with various terms and conditions imposed by the agency (R. 85-91).

A dispute as to petitioner's liability on its performance bond arose in 1956 after HHFA had requested the City to have petitioner execute a new bond on a standard agency form (R. 132, 136). On December 14, 1956, petitioner informed HHFA that it no longer considered itself to be liable on the bond (R. 108). On January 2, 1957, in response to a letter from HHFA enclosing a copy of petitioner's letter of December 14, 1960, and suggesting that the dispute be settled "immediately" (R. 150), the City's attorney advised petitioner that it still considered the bond valid and enforceable (R. 71). In a response on March 29, 1957, petitioner notified the City that it would "* * * not be bound by the bond * * *" (R. 109).

On February 21, 1957, HHFA had authorized the City to issue a notice to proceed to Reser (R. 58), which was done on February 23, 1957 (R. 128). Work on the project actually started on April 26, 1957. From time to time during the course of work on the project, an HHFA engineer, Sonnenberg, certified payments to the Contractor for completed work, which enabled the City to draw HHFA funds for the

payments (R. 179-180). Work proceeded without apparent difficulty until some time later in 1957 when, because of a labor dispute, Reser abandoned the project (R. 162-163, 180-181). On September 23, 1957, the City notified the Contractor of its intention to terminate the contract and complete the project at the Contractor's or surety's expense (R. 67-68). A similar notice was sent to petitioner on September 26, 1957 (R. 68).

This action was commenced on April 5, 1957 (R. 1). In its original complaint (R. 7-9) petitioner alleged that the contract between Reser and the City of Buckner had been breached by the City and that its bond was, therefore, null and void (R. 8). The City counterclaimed on April 24, 1958, for damages that it alleged arose from Reser's failure to complete the project (R. 18).

On May 21, 1959, petitioner filed its "First Amended Complaint", adding the respondent Housing and Home Finance Administrator as a party defendant (R. 23-27). To the allegations of the original complaint was added the assertion that a new contract, required by the Housing and Home Finance Administrator, had been entered into by the City and Reser and that since this rescinded the original contract, petitioner was relieved of any obligation under its bond (R. 23-27). It was further alleged that the Administrator was responsible for any loss because he "notified the City to issue a notice to proceed to Reser when he knew that Reser was financially unable to perform the contract and that a loss would occur." (R. 25.)

On July 23, 1959, the Administrator filed a motion to dismiss the complaint on the ground that there had been no proper service of process upon him and that he was not a necessary party to the action since he had no interest in its outcome (R. 3). On August 5, the district court denied the motion but ordered the purported service quashed (R. 3). Petitioner moved to set aside the order quashing service on August 21, 1959, which motion was granted by the court on September 9, 1959 (R. 3). On December 19, 1960, after the close of petitioner's case, the Administrator moved to dismiss the complaint on the same grounds stated in his earlier motion of July 23, 1959 (R. 4, 55, 56). The court granted the motion on the same date (R. 4). No formal order dismissing the complaint was entered by the court until the conclusion of the trial on petitioner's claim against the other defendants. On August 18, 1961, the district court ordered (R. 5):

> That Housing and Home Finance Administrator have judgment against the plaintiff on plaintiff's complaint.

The district court held that the bond was valid and entered a judgment in the amount of $30,180.73 in favor of the City of Buckner and a judgment in the amount of $31,535.78 in favor of petitioner against defendant William A. Reser (R. 5-6).

The Court of Appeals affirmed. As to petitioner's claim against the Housing and Home Finance Administrator it held (Pet. App. A 8):

The contention of Phoenix that it is entitled to visit its misfortune upon the Housing and Home Administrator has too inadequate a base to merit discussion. Assuming that he was properly served with process, his relation to the City was only that of a lender of Government funds and a purchaser of the City's Revenue Bonds. The claim against him was properly dismissed.

ARGUMENT

Petitioner's assertions that the decision below is in conflict with this Court's decision in *Federal Housing Administration* v. *Burr*, 309 U.S. 242, and with the decision of the Court of Appeals for the Second Circuit in *Gart* v. *Cole*, 263 F. 2d 244, and that it presents an important question of federal law, are all bottomed on the assumption that the question the Court of Appeals decided was that "* * * even if the [Administrator] was doing business in Missouri, he could not be sued there because he was not personally served there." (Pet. 5-6.) The Court of Appeals, however, as recognized by petitioner in its Statement (Pet. 5), expressly declined to pass on the adequacy of the attempted service on the Administrator (Pet. App. A8), and rested its decision on the patently frivolous nature of petitioner's claim.

Petitioner, here, has not attempted to spell out any theory of liability on the part of the Administrator. In any event, the court below was clearly correct in its conclusion that petitioner's claim against the Administrator is completely without merit. The only

connection the Housing and Home Finance Agency had with the subject project was that it supplied the necessary funds for it to the City of Buckner. The fact that the City's use of these funds was conditioned on the City's meeting certain requirements of the Agency had nothing to do with petitioner's liability on its performance bond.

In the court below, petitioner urged that the Administrator was responsible for the loss that occurred because he negligently ordered work on the project to proceed when he knew that the Contractor was in financial difficulties. What petitioner suggested was that it could transfer its liability on the performance bond to the Administrator because, at the time the Administrator ordered work on the project to proceed, he knew the Contractor would not be able to complete performance.[7] But petitioner was paid to assume the risk that, because of financial or other difficulties, the Contractor would not timely complete the work. The Administrator, of course, did not create the Contractor's financial predicament. Merely because he allegedly knew of these difficulties is no reason why petitioner should be permitted to transfer the burden of its contractual obligation to him.[8]

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[7] It should be noted that, contrary to petitioner's assertion below, the record shows that the Administrator never "ordered" work on the project to proceed.

[8] Moreover, since the claim sounds in tort, the courts below had no jurisdiction to entertain the suit against the Administrator. Under 28 U.S.C. 2679, it could only be brought against the United States and not against a federal agency, *eo nomine*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
JERRY C. STRAUS,
Attorneys.

SEPTEMBER 1962.

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